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L.W., Appellant)	
)	
and)	Docket No. 21-0942
)	Issued: May 11, 2022
DEPARTMENT OF COMMERCE, U.S.)	
CENSUS BUREAU, Hyattsville, MD, Employer)	
)	

Case Submitted on the Record

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On June 1, 2021 appellant filed a timely appeal from an April 27, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from the last merit decision, dated April 3, 2020, to the filing of this appeal, pursuant to the Federal

¹ Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, appellant asserted that certain medical records may not have been reviewed by OWCP. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this claim.³

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On May 27, 2010 appellant, then a 59-year-old enumerator, filed a traumatic injury claim (Form CA-1) alleging that on May 14, 2010 she injured her left wrist, lower back, knees, and left hip when she slipped and fell while in the performance of duty. On August 2, 2010 OWCP accepted appellant's claim for lumbar sprain, bilateral knee/leg sprain, bilateral knee contusion, and left hip/thigh sprain.

By decision dated September 15, 2014, OWCP granted appellant a schedule award for 62 percent permanent impairment of the right lower extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ It based its schedule award decision on the October 24, 2012 report of Dr. Edward A. Rankin, a Board-certified orthopedic surgeon, and the July 2, 2013 report of Dr. Lawrence A. Manning, an OWCP district medical adviser (DMA) and orthopedic surgeon. The overall rating of 62 percent included combined impairments for right hip arthritis (50 percent) and right knee arthritis (24 percent) under the sixth edition of the A.M.A., *Guides*. The award covered a period of 178.56 weeks from May 14, 2011 through October 14, 2014.

Appellant timely requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. By decision dated March 23, 2015, OWCP's hearing representative affirmed the September 15, 2014 decision, finding that the medical evidence of record was insufficient to establish greater than 62 percent permanent impairment of the right lower extremity.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the April 27, 2021 decision, appellant submitted additional evidence to OWCP and on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁴ Docket No. 18-1437 (issued August 2, 2019).

⁵ A.M.A., *Guides* (6th ed. 2009).

On April 9, 2015 OWCP expanded the acceptance of appellant's claim to include right knee lateral meniscus tear and contusion of the left wrist.

On April 27, 2016 appellant filed a claim for compensation (Form CA-7) for an additional schedule award.

On August 1, 2016 OWCP referred appellant to Dr. Chester DiLallo, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the extent of her permanent impairment due to the accepted employment injury.

In an August 23, 2016 impairment evaluation, Dr. DiLallo diagnosed osteoarthritis of the right knee, a lateral meniscus tear, and a medial meniscus tear. Using the sixth edition of the A.M.A., *Guides*, he calculated a right lower extremity impairment rating of 15 percent. Dr. DiLallo noted a date of maximum medical improvement (MMI) of August 23, 2016.

By letter dated November 2, 2016, OWCP requested that Dr. DiLallo clarify whether his final 15 percent permanent impairment rating for the right lower extremity was a calculation of a total impairment rating or a percentage in addition to appellant's prior rating of 62 percent.

In a supplemental opinion dated December 22, 2016, Dr. DiLallo explained that his assessment was 15 percent permanent impairment of the right lower extremity, attributable to the knee. He noted that his impairment evaluation did not replace the 62 percent permanent impairment award that had previously been granted for the right hip and knee. Dr. DiLallo explained that appellant's current 15 percent permanent impairment of the right knee was not in addition to the prior award.

On February 3, 2017 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and DMA, applied the sixth edition of the A.M.A., *Guides* to Dr. DiLallo's findings. He noted that, under the A.M.A., *Guides*, diagnosis-based impairment (DBI) rating methodology for the knee allowed for 16 percent impairment for documented degenerative joint disease, rather than 15 percent, and that for this reason he disagreed with Dr. DiLallo's impairment rating. Dr. Harris stated that there had been no increase in appellant's right lower extremity permanent impairment of the knee and no increase in appellant's overall prior permanent impairment of the right lower extremity. He opined that appellant had reached MMI on August 23, 2016.

By decision dated February 15, 2017, OWCP denied appellant's claim for an additional schedule award, finding that the weight of the medical evidence rested with Dr. Harris.

On March 3, 2017 appellant, through then-counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In an impairment evaluation dated March 18, 2017, Dr. Robert W. Macht, a general surgeon, diagnosed sprain injury of the left wrist, contusions of both knees with subsequent arthritis, status post partial right medial and lateral meniscectomies, and a sprain injury of both hips. He provided permanent impairment ratings under the sixth edition of the A.M.A., *Guides* of 12 percent of the left lower extremity and 12 percent of the right lower extremity. Dr. Macht found that appellant had reached MMI by February 6, 2017.

By decision dated November 14, 2017, OWCP's hearing representative set aside the February 15, 2017 decision and remanded appellant's claim for further development.

In a January 27, 2018 report, the DMA, Dr. Harris, reviewed a statement of accepted facts and appellant's medical records. He noted diagnoses of: status post right knee arthroscopy with arthroscopic partial medial and lateral meniscectomy and abrasion arthroplasty; status post right knee arthroscopy with arthroscopic partial medial and lateral meniscectomy; left knee degenerative joint disease; bilateral hip strains; and a history of left wrist contusion. Dr. Harris concurred with Dr. Macht's 12 percent rating for permanent impairment of the right lower extremity based on DBI, combining a 2 percent impairment of the right hip with a 10 percent impairment of the right knee. With regard to appellant's left lower extremity permanent impairment, he also concurred with Dr. Macht's 12 percent rating for the left lower extremity based on DBI, combining a 5 percent impairment of the left hip with a 7 percent impairment of the left knee. Dr. Harris found that appellant did not have any impairment in the left upper extremity, as there were no significant objective findings to support it. He noted the date of MMI as March 18, 2017, contrary to Dr. Macht's February 6, 2017 date of MMI, explaining that the case file did not contain any medical records documenting that appellant had reached MMI prior to her evaluation by Dr. Macht. Dr. Harris concluded that she had no increase in her right lower extremity impairment.

By decision dated February 28, 2018, OWCP issued a *de novo* decision again denying appellant's claim for an additional schedule award.

On March 27, 2018 appellant requested reconsideration of OWCP's February 28, 2018 decision.

OWCP received treatment records from Dr. Daniel R. Ignacio, a Board-certified physiatrist, covering the period January 26 to May 31, 2018. Dr. Ignacio noted that he was treating appellant for work-related injuries sustained on May 14, 2010. In his latest report, he diagnosed chronic lumbar sprain with lumbar neuritis, bilateral knee sprain, bilateral knee internal derangement, post-traumatic arthropathy of the knees, right knee lateral meniscus tear, chronic left wrist sprain, and chronic left carpal tunnel syndrome.

By decision dated June 25, 2018, OWCP denied modification.

On July 17, 2018 appellant appealed the June 25, 2018 decision of OWCP to the Board. By decision dated August 2, 2019, the Board set aside OWCP's June 25, 2018 decision, finding that the case was not in posture for decision as to either upper or lower extremity permanent impairment. The Board found that OWCP improperly combined appellant's left and right lower extremity permanent impairment ratings and had improperly offset her left lower extremity impairment against her prior right lower extremity schedule award. The Board further found that Dr. Macht noted one percent left upper extremity permanent impairment based on a diagnosis of left wrist sprain, and that the DBI rating provided by Dr. Macht under Table 15-3 (Wrist Regional Grid) allowed for an alternative rating based on loss of range of motion (ROM) and remanded to OWCP for a DMA to reevaluate Dr. Macht's upper extremity impairment rating in accordance with FECA Bulletin No. 17-06.

On September 10, 2019 OWCP requested a clarification from Dr. Harris regarding his February 8, 2017 and February 5, 2018 reports. In a September 13, 2019 report, Dr. Harris

calculated one percent left upper extremity permanent impairment for appellant's wrist strain under the DBI method, zero percent left upper extremity impairment based on the ROM method, and noted that the DBI method resulted in greater impairment.

By decision dated November 6, 2019, OWCP granted appellant a schedule award for one percent permanent impairment of the left upper extremity. The award covered a period of 3.12 weeks from March 18 through April 8, 2017.

By decision dated November 25, 2019, OWCP granted appellant a schedule award for 12 percent permanent impairment of the left lower extremity. The award covered a period of 34.56 weeks from April 9 through December 6, 2017.

OWCP continued to received medical evidence. In a report dated November 26, 2018, Dr. Ignacio examined appellant for complaints of pain along the back, legs, knees, left hip, and left wrist. He diagnosed chronic left wrist sprain; chronic left carpal tunnel syndrome, chronic lumbar sprain with lumbar neuritis; chronic lumbar disc displacement with lumbar radiculopathy; chronic pain along the left hip; chronic bilateral knee sprain; chronic internal derangement along the knees; chronic torn lateral meniscus along the right knee; and complex regional pain syndrome.

In a report dated October 15, 2019, Dr. Rankin examined appellant for complaints of intermittent right knee pain and stiffness, diagnosing unilateral primary osteoarthritis of the right hip and right knee.

In a report dated December 9, 2019, Dr. Jatinder Narula, a Board-certified physiatrist, examined appellant for a longstanding history of right knee pain and stiffness. He diagnosed unilateral primary osteoarthritis of the right hip and right knee, and pain in the right hip. Dr. Narula recommended a right hip arthrogram/intra-articular injection.

On January 6, 2020 appellant requested reconsideration of OWCP's November 6, 2019 decision.

OWCP subsequently received additional evidence. In a February 11, 2020 report, Dr. Rankin diagnosed unilateral primary osteoarthritis of the right hip and right knee and pain in the right hip. He recommended referral to interventional radiology for a cortisone injection into the right hip both for diagnostic and potential therapeutic measures.

By decision dated April 3, 2020, OWCP denied modification of its November 6, 2019 left upper extremity schedule award decision.

On April 1, 2021 appellant, through her then-counsel, requested reconsideration of OWCP's April 3, 2020 decision. In an accompanying letter, then-counsel argued that OWCP had erred by failing to consider additional work-related conditions, including unilateral primary osteoarthritis of the right hip and right knee, when determining her percentage of impairment. Appellant's then-counsel argued that the conditions of chronic left wrist sprain, chronic left carpal tunnel syndrome, chronic lumbar sprain with lumbar neuritis; chronic progressive lumbar disc displacement with lumbar radiculopathy; chronic left hip sprain; chronic bilateral contusions along the knee; chronic bilateral knee sprain with internal derangement; torn meniscus of the right knee; and complex regional pain syndrome should be accepted under her claim.

In a report dated September 17, 2020, Dr. Rankin noted that appellant followed up for complaints of right knee pain and right hip joint pain. On examination he observed mildly antalgic gait and limping on the left side, tenderness to palpation of the left and right paraspinal musculature with bilateral sacroiliac joint tenderness, trochanteric tenderness, left hip range of motion limited with pain, positive patella apprehension and patellar grind tests of the bilateral knees, medial patellofemoral tenderness, patellar tendon tenderness, and quadriceps weakness. Dr. Rankin diagnosed lumbar spondylosis without myelopathy or radiculopathy, right knee chondromalacia patellae, and left trochanteric bursitis. He administered a steroid intra-articular injection to the left hip.

By decision dated April 27, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

⁶ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁹ *Supra* note 7 at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Preliminarily, the Board finds that OWCP did not receive additional evidence of permanent impairment with appellant's request for reconsideration received on April 1, 2021. The Board will, therefore, consider this a reconsideration request as opposed to a claim for an additional schedule award.¹¹

In support of appellant's request for reconsideration, appellant's then-counsel alleged that OWCP had erroneously failed to consider additional work-related conditions, including unilateral primary osteoarthritis of the right hip and right knee, when determining her percentage of impairment. She also argued that the conditions of chronic left wrist sprain, chronic left carpal tunnel syndrome, chronic lumbar sprain with lumbar neuritis; chronic progressive lumbar disc displacement with lumbar radiculopathy; chronic left hip sprain; chronic bilateral contusions along the knee; chronic bilateral knee sprain with internal derangement; torn meniscus of the right knee; and complex regional pain syndrome should be accepted under her claim. However, these arguments were duplicative of arguments previously of record and, therefore, do not constitute a basis for reopening the case.¹² Consequently, appellant is not entitled to further review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹³

With her reconsideration request, appellant submitted a September 17, 2020 report from Dr. Rankin, which diagnosed lumbar spondylosis without myelopathy or radiculopathy, right knee chondromalacia patellae, and left trochanteric bursitis. However, as Dr. Rankin did not proffer an impairment rating based upon the sixth edition of the A.M.A., *Guides* in his September 17, 2020 report, the Board finds that this evidence is irrelevant to the underlying issue of whether appellant has established greater than one percent permanent impairment of the left upper extremity. The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ As such, appellant is not entitled to further review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹⁵

¹¹ See *C.S.*, Docket No. 19-0851 (issued November 18, 2019); *P.D.*, Docket No. 18-0962 (issued September 18, 2019).

¹² See *F.H.*, Docket No. 20-0309 (issued January 26, 2021); *C.M.*, Docket No. 19-1610 (issued October 27, 2020); *Eugene F. Butler*, 36 ECAB 393 (1984).

¹³ *Supra* note 7 at § 10.606(b)(3).

¹⁴ See *F.H.*, *supra* note 12; *T.T.*, Docket No. 19-0319 (issued October 26, 2020); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECB 140 (2000); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁵ *Supra* note 13.

The Board, accordingly, finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁶

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.¹⁷

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ *C.M.*, *supra* note 12; *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

¹⁷ *See K.F.*, Docket No. 21-0021 (issued September 28, 2021).